

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LANCE ALLEN SCHMITT,

Defendant-Appellant.

UNPUBLISHED

July 31, 2007

No. 264176

Oakland Circuit Court

LC No. 04-197437-FC

Before: Zahra, P.J., and Cavanagh and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial conviction for second-degree murder, MCL 750.317. The trial court sentenced defendant to 20 to 40 years in prison for his murder conviction. We reverse and remand for a new trial.

I. FACTS

On November 20, 2002, defendant Lance Allen Schmitt and his co-defendant Joseph Stapleton were involved in an altercation with Peter Richard outside of the Clarkston McDonald's.¹ After exchanging words with Richard, defendant or Stapleton moved behind Richard, and the other punched Richard in the face. Richard fell to the ground, and defendant and Stapleton repeatedly hit and kicked Richard in the face and back. Richard attempted to get up, but defendant and Stapleton kept hitting and kicking him. Richard was beaten until he was unconscious. When Richard regained consciousness, he was helped into the restaurant. He complained of back pain and asked if anyone had hit him in his back. Richard was bleeding profusely from the nose, eyes, mouth, and side.²

At the emergency room, x-rays revealed a fractured transverse process on Richard's third lumbar vertebra. After the assault, Richard complained of back pain. He treated with various

¹ Although not consolidated for appellate consideration, the appeal in this case and that of co-defendant Stapleton were submitted together for consideration by this panel.

² McDonald's provided the police with a surveillance videotape from the parking lot, and this videotape was played for the jury.

physicians and participated in physical therapy from January until March 2003. His physical therapist, David Thibodeau, was surprised that Richard's pain did not decrease over time, so he suspected that Richard may have a disk problem and referred him back to his doctor.

On March 10, 2003, Richard told Thibodeau that he had fallen on some steps and landed on his back shortly before his appointment. Although Richard reported an increase in pain that day, Thibodeau noted that his mobility was good, and he did not give Richard any restrictions on activities. Richard returned to his family doctor, Dr. Kurt Coulter, complaining of pain in his left leg and the small of his back. In October 2003, Richard visited Dr. Abner Espinosa, who specializes in internal medicine and rheumatology, complaining of back and leg pain. Espinosa ordered an MRI of Richard's lumbar spine and discovered a herniated disk.

Espinosa referred Richard to Dr. Fernando Diaz, a neurosurgeon who determined that Richard had a ruptured disk. Diaz informed Richard of the risks of surgery, including heart attack, stroke, seizure, bleeding, blood clots, infection, paralysis, pain and numbness. Richard elected to have surgery; it was not, however, medically necessary. Richard underwent a successful laminectomy and disk removal on January 27, 2004, and he remained in the hospital for three days. When Richard was discharged from the hospital, there was no evidence of blood clots. Richard continued to experience pain after the surgery, which Diaz considered normal.

On March 4, 2004, Richard died of a pulmonary embolism, a blood clot that blocked the lungs. Dr. Kanu Virani, the medical examiner who performed Richard's autopsy, discovered a blood clot in Richard's left leg and identified it as the source of the embolism. The clot occurred 24 to 48 hours before death. Virani opined that the underlying reason for the blood clot was the healing process from Richard's back injury and classified the manner of death as homicide. Virani explained that, whenever a person has limited mobility following major surgery, blood clots in the lower extremities are a common complication.

Defendant and Stapleton were originally charged with and convicted of assault with intent to do great bodily harm less than murder, and sentenced to three years' probation. Defendant served the first 11 months of his sentence in jail. However, after Richard's death, the prosecutor enhanced the charge to second-degree murder.

In June 2005, following his conviction by a jury, defendant was sentenced to 20 to 40 years in prison. At the trial, causation was the main issue. Defendant's court-appointed attorney, McCarthy, retained an independent medical examiner, Dr. Spitz, as an expert witness. Spitz was prepared to testify that the time between the assault and Richard's death eliminated the association between the trauma and cause of Richard's death. Due to a fee dispute between Spitz and McCarthy, Spitz did not testify at trial, even though McCarthy informed defendant that the testimony was essential.

II. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant asserts that he is entitled to a new trial because he was denied his right to the effective assistance of counsel. We agree.

A. Standard of Review

“Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law.” *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court’s findings of fact for clear error and questions of constitutional law de novo. *Id.*

B. Analysis

The United States and Michigan Constitutions guarantee the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20; *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). To establish ineffective assistance of counsel, a defendant must show that: (1) counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different; and (3) the resultant proceedings were fundamentally unfair or unreliable. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Defendant bears the heavy burden of overcoming the presumption that counsel’s representation was effective. *LeBlanc*, *supra* at 578.

The prosecution alleges that defendant waived his right to bring an ineffective assistance claim regarding defense counsel’s decision not to call Dr. Spitz to testify at trial. We disagree.

A waiver of the defendant’s right to counsel is valid if (1) the waiver is unequivocally made, (2) the waiver is made knowingly, intelligently and voluntarily, and (3) the trial court is sure that the waiver will not disrupt the proceedings. *People v Williams*, 470 Mich 634, 642; 683 NW2d 597 (2004). Although *Williams* addressed the waiver of the right to counsel altogether, the test is similar for this case because Schmitt and Stapleton were allegedly waiving their right to *effective assistance of counsel*. *Id.* The right to counsel includes the requirement that that counsel be effective. *Strickland v. Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). “[T]he defendant must personally make an informed waiver for certain fundamental rights, such as the right to counsel . . .” *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000), citing *New York v Hill*, 528 US 110; 120 S Ct 659, 663 (2000) (emphasis added).

At the *Ginther*³ hearing, defendant admitted that it was his decision not to have Spitz testify at trial. However, defendant also testified that his attorney told him that Spitz’s testimony was essential, that defendant was never informed about Spitz’s lack of preparation for trial, and that defendant had no knowledge before his testimony on the witness stand of the fee dispute involved with Spitz’s testimony. Defendant did not have enough information to validly waive the claim of ineffective assistance of counsel. Since the right was not waived knowingly, there was no valid waiver of defendant’s right to the effective assistance of counsel in this case.

Further, based on evidence presented at the *Ginther* hearing, we find that defense counsel’s conduct fell below an objective standard of reasonableness when he failed to call Dr.

³ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Spitz at trial. Jerome Sabbota, a criminal defense attorney, testified that it is necessary to meet with an expert witness before trial, which McCarthy failed to do with Spitz. Sabbota also testified that he had never been denied a request for funds to pay an expert witness, indicating that failure to request funds is no excuse for not calling a witness. Although Sabbota did indicate that he might not call a witness who was unprepared, Dr. Spitz was contesting a fee issue with McCarthy, and had already indicated the direction of his testimony. In light of the “essential” testimony Spitz was to present, it is hard to believe that an attorney would not want to add this expert’s considerable weight to the case. Failure to call a witness is ineffective assistance only when it deprives the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). It is arguable that had Dr. Spitz testified, that evidence that the blood clot was the cause of Richard’s death may have been presented to the jury. Given that the issue of causation was central and pivotal to defendant’s case, the failure of defense counsel to attempt to have Dr. Spitz testify constituted ineffective assistance of counsel. *Id.* It is indeed probable that Dr. Spitz’s testimony might have introduced evidence of a defense to second-degree murder, in that the elective surgery chosen by Richard was not a direct result of the assault, but that the blood clot was the cause of death predicated by the elective surgery itself. Therefore, because defense counsel was ineffective in failing to call Dr. Werner Spitz as a witness at trial, we conclude that defendant is entitled to a new trial.

Finally, in light of our decision to grant a new trial on the ground of ineffective assistance of counsel, we need not address the other issues raised by defendant on appeal.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Bill Schuette